

COMMONWEALTH OF MASSACHUSETTS
HOUSING APPEALS COMMITTEE

EAST HOMES TRUST

v.

TYNGBROUGH BOARD OF APPEALS

No. 02-37

RULINGS ON MOTION TO DISMISS
AND
MOTION IN LIMINE

July 21, 2003

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Appellant

v.

TYNGSBOROUGH BOARD OF APPEALS,

Appellee

No. 02-37

**RULINGS ON MOTION TO DISMISS
AND
MOTION IN LIMINE**

I. PROCEDURAL HISTORY

In December 2001, the East Homes Trust, LLC submitted an application to the Tyngsborough Zoning Board of Appeals for a Comprehensive Permit pursuant to G.L. c. 40B, §§ 20-23 to build mixed-income affordable housing on a 7.8-acre site at Lakeview Avenue in Tyngsborough. The proposal was for 16 single-family homes to be financed under the Massachusetts Housing Finance Agency's Housing Starts program. After several public hearings, the Board denied the permit in a decision filed with the town clerk on November 25, 2002. On December 12, 2002, the developer appealed to the Housing Appeals Committee.

At the Committee's opening hearing session, a conference of counsel on January 8, 2003, it was apparent that before the merits of the housing proposal could be addressed, the

question of whether the town has reached the 10% threshold in the Comprehensive Permit Law should be considered. (See below). With the agreement of the parties, evidentiary sessions were not scheduled, but rather, the Board filed a Motion to Dismiss in May, and in June the developer filed its opposition to that motion. The Board also filed a Motion in Limine to bar the introduction of certain evidence during the Committee's proceedings.

II. DISCUSSION AND RULINGS

The Comprehensive Permit law creates what is in effect an affirmative defense that may be asserted by the Board: "Requirements... shall be consistent with local needs when imposed... in a city or town where... low or moderate income housing exists which is in excess of ten percent of the housing units reported in the latest federal decennial census...." G.L. c. 40B § 20.¹ The parties disagree as to whether the town has reached this threshold, and their disagreement centers on new housing units that have come into existence since the 2000 census. The Board argues that as a result of the approval of two comprehensive permits in September 2002, the town now exceeds the 10% threshold. The developer, on the other hand, contends that the town does not exceed the threshold because the number of total housing units in Tyngsborough has also increased since the census was issued.

The regulatory framework for the calculation of each community's progress toward the ten percent threshold is provided in 760 CMR 31.04(1), which refers to the Department of Housing and Community Development's Subsidized Housing Inventory. The latest

1. We have noted in the past that the statutory requirement should be treated as an affirmative defense to be raised and proven by the Board. See, e.g., *Casaleto Estates, LLC v. Georgetown*, No. 01-12, slip op. at 15 (Mass. Housing Appeals Committee May 19, 2003); *Franklin Commons Ltd. Partnership v. Franklin*, No. 00-09, slip op. at 2 n.1 (Housing Appeals Committee Sep. 27, 2001).

version of this inventory is based on the 2000 federal census, and shows housing units as of October 1, 2001, with revisions through April 24, 2002. See www.state.ma.us/dhcd/components/hac/HsInvN01.pdf and www.state.ma.us/dhcd/components/hac/HsInvRev.pdf. It indicates that Tyngsborough has 3,784 total housing units, of which 116 are low or moderate income housing units. The Board claims (and the developer apparently does not dispute the claim) that an additional 266 countable affordable units were added to the inventory as a result of the issuance of two comprehensive permits in late September 2002.² See 760 CMR 31.04(1)(a). Thus, it argues, there are a total of 382 low or moderate income housing units in Tyngsborough, or 10.09%. The developer states, however, that during the hearing it will prove that more than 36 non-subsidized housing units have also been added to the total housing stock in Tyngsborough since the census was issued. Thus, it argues, the town is currently below the 10% threshold.

I hereby grant the Board's Motion in Limine, and rule that the developer may not introduce evidence of additional non-subsidized housing units that may have been added to Tyngsborough's total housing stock since the 2000 census was issued.

Our regulations, in 760 CMR 31.04(1)(b), state:

(b) the total number of housing units shall be that total number of units enumerated for the city or town in the latest available United States Census; provided that *evidence that net additional units have been occupied*, have become available for occupancy, or are under building permit or that total units have decreased *between the latest Census and the date of initial application shall be considered*. (emphasis added)

2. All 144 units in the Merrimac Landing rental development count toward the 10% threshold figure. The Maple Ridge development is part rental and part homeownership. All of its 96 rental units count, and the 26 affordable units of its 104 for-sale units count.

But the Comprehensive Permit Law itself states clearly and simply that the decision of the local board shall be upheld “where ... low or moderate income housing exists which is in excess of ten per cent of the housing units reported in the latest federal decennial census....” G.L. c. 40B, §20. The portion of our regulation that requires consideration of additional units that came into existence after the census was issued is inconsistent with the law and therefore null and void.

The developer points out that in the case of *Dartmouth Crossroads Assoc. v. Dartmouth*, No. 80-12 (Mass. Housing Appeals Committee Oct. 20, 1981), in addressing circumstances nearly identical to those presented here, we upheld the regulatory language. That decision, however, was wrong. It relied heavily on an opinion of the Attorney General and precedents that an administrative body “may, by means of appropriate regulation, interpret ambiguous language” contained in a statute. The language in Chapter 40B, § 20, however, is not ambiguous.³

Though my ruling on the Motion in Limine at first glance appears to be dispositive of this case, it may not be. Pursuant to 760 CMR 31.04(1)(a), the 266 new low or moderate income units will cease to be counted toward the 10% threshold if building permits are not issued within a year of the granting of the comprehensive permits, that is, the end of September 2003. There is no evidence before me as to whether building permits have been

3. Though the *Dartmouth Crossroads* case has been assumed to be correct for over twenty years, the question of how housing units should be counted has not been addressed frequently during that time. Only recently have a significant number of municipalities begun to approach the 10% threshold. See, e.g., *Casaletto Estates, LLC v. Georgetown*, No. 01-12 (Mass. Housing Appeals Committee May 19, 2003). The developer points out that in that case, we indicated that the section of 760 CMR 31.04 that is in dispute here “is unchanged.” We went on, however, to suggest that the provision should be revised. *Georgetown*, slip op. at 20. We also take note of an affidavit filed with the Board’s motions. In it, the Chief Counsel of the Department of Housing and Community Development, which promulgates our regulations, indicates that in preparing the Subsidized Housing Inventory, DHCD interprets the statute as we do, and that it intends to so amend the regulation.

issued, and I am reluctant to dismiss this appeal since it is possible that the town will no longer exceed the threshold two months from now. Though *Casaleto Estates, LLC v. Georgetown*, No. 01-12, slip op. at 18 (Mass. Housing Appeals Committee May 19, 2003) held that the town's progress should be measured when a comprehensive permit decision is rendered, the effect of the town falling back below the threshold, particularly under the circumstances that might be presented here, is not clear. Therefore, based upon the evidence currently before me, I deny the Board's Motion to Dismiss, and I stay these proceedings until October 1, 2003. If additional evidence becomes available, the Motion to Dismiss may be renewed.

Housing Appeals Committee

A handwritten signature in black ink, appearing to read 'W. Lohe', written over a horizontal line.

Werner Lohe, Chairman
Presiding Officer

Date: July 21, 2003